

State of Maine

DEPARTMENT OF ATTORNEY GENERAL

MEMORANDUM

TO: Mike Mendel, Bureau of Air Quality Control/ DEP

FROM: Sarah Roberts Walton, Assistant Attorney General

DATE: March 6, 1995

RE: What "Adjacent" Means in the Chapter 100 Definition of "Facility"

The term "facility" as defined in DEP regulations, Chapter 100(38) "means all of the pollutant-emitting activities which belong to the same industrial grouping, are located on one or more contiguous or adjacent properties, and are under the control of the same person (or persons under common control)." You have asked me what the phrase "located on one or more adjacent properties" means in the context of the Chapter 100(38) definition of "facility."

In construing a very old eminent domain statute, the Maine Supreme Judicial Court, gave the word "adjacent" its narrow definition, meaning "adjoining" or "contiguous" as reflecting legislative intent in that instance, but in so doing, noted that the term "adjacent does not necessarily, nor even most frequently, have that meaning." See Clark v. Coburn, 78 A. 1107, 1107 (Me. 1911). In all of the later cases which I was able to locate, however, the Court has construed "adjacent" in other contexts as having its broader meaning of nearness without immediate proximity. See Aalberg v. Stevens, 489 A.2d 1, 3 (Me. 1985) and Finks v. Maine State Highway Commission, 328 A.2d 791, 798 (Me. 1974). In Finks, the Court was construing the phrase "along and adjacent" in an eminent domain statute and stated that

Both words represent relative concepts and have no arbitrary meaning or definition and their interpretation in any particular case must be determined in the light of the object to be accomplished by the statutory provisions in which they are used.... Adjacent, it is said, conveys the idea merely of nearness, and not immediate proximity. Its meaning is not restricted to the more confining words adjoining, contiguous to, contacting, touching, abutting, along, fronting, next to, attached, beside or bordering. Even the last above words do not necessarily imply that the things spoken of are in contact.

The term "adjacent" is defined in Black's Law Dictionary (6th Edition, 1990) as follows: lying near or close to; sometimes, contiguous; neighboring. Adjacent implies that the two objects are not widely separated, though they may not actually touch, while adjoining imports that they are so joined or united to each other that no third object intervenes.

The definition of "facility" in DEP regulations, Chapter 100(38) mirrors the federal Clean Air Act regulatory definitions. See, e.g., PSD and NSR definitions, 40 CFR 51.165(a)(1)(ii), 51.166(b)(4); 40 CFR 52.21(b)(6). EPA, in construing "adjacent" in the context of the federal definition of "facility" has stated that

Although "contiguous" is clear in its meaning of actually touching, "adjacent" is subject to broader interpretation, including that of being nearby but "not touching." What is "adjacent" depends not only on physical distance, but on related issues arising from the type of nexus existing between facilities. In ambiguous situations, the EPA

prefers to make determinations of whether various industrial operations are part of the same source on a case-by-case basis based on implementation experience and common sense. For these reasons, the EPA has chosen not to include a single, inflexible definition of "contiguous or adjacent property" (or "contiguous area") in its regulations.

8 Fed. Reg. 42767 (Aug. 11,1993).

Based on the foregoing, it seems clear that the phrase "located on one or more adjacent properties" in the context of the Chapter 100(38) definition of "facility" requires only that the properties be "nearby" but does not require that the properties touch. It also appears that the Bureau must make a case-by-case determination of how close two or more properties must be before they are no longer "adjacent" based upon the Bureau staff's implementation experience and common sense.

Please feel free to call me if you need further assistance in this matter.